

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

LEAGUE OF CONSERVATION)
VOTERS, ET AL.,)
)
 Plaintiffs,)
)
vs.) CASE NO. 3:17-cv-00101-SLG
)
DONALD J. TRUMP, ET AL.,)
)
 Defendants.)
-----)

TRANSCRIPT OF ORAL ARGUMENT
BEFORE THE HONORABLE SHARON L. GLEASON, DISTRICT JUDGE
November 9, 2018; 10:03 a.m.
Anchorage, Alaska

FOR THE PLAINTIFFS:

Earthjustice
BY: ERIK CLIFFORD GRAFE
441 West 5th Avenue, Suite 301
Anchorage, Alaska 99501
(907) 277-2500

Natural Resource Defense Council
BY: NATHANIEL S.W. LAWRENCE
BY: JACQUELINE MIYA IWATA
3723 Holiday Drive, SE
Olympia, Washington 98501
(360) 534-9900

FOR THE DEFENDANTS:

Covington & Burling, LLP
BY: STEVEN JOSEPH ROSENBAUM
1201 Pennsylvania Avenue, NW
Washington, DC 20004
(202) 662-5568

Alaska Department of Law
BY: JENNIFER ELLEN DOUGLAS
1031 West 4th Avenue, Suite 200
Anchorage, Alaska 99501
(907) 269-5232

SONJA L. REEVES, RMR-CRR
Federal Official Court Reporter

1 APPEARANCES CONTINUED:

2 U.S. Department of Justice

BY: JEFFREY WOOD

3 BY: RICHARD L. POMEROY

950 Pennsylvania Avenue, NW, Room 2611

4 Washington, DC 20530

(202) 514-0943

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 (Call to Order of the Court at 10:03 a.m.)

2 DEPUTY CLERK: All rise. Her Honor, the Court,
3 the United States District Court for the District of
4 Alaska is now in session, the Honorable Sharon L.
5 Gleason presiding.

6 Please be seated.

7 THE COURT: Good morning. We're on record in
8 League of Conservation Voters versus Trump, et al., and
9 I have a number of lawyers here.

10 Mr. Grafe, why we don't start with you and have
11 everyone identify themselves.

12 MR. GRAFE: Erik Grafe for the plaintiffs.

13 MR. LAWRENCE: Nathaniel Lawrence for the
14 plaintiffs.

15 MS. IWATA: Jacqueline Iwata for the
16 plaintiffs.

17 MR. WOOD: Jeffrey Wood from the U.S.
18 Department of Justice.

19 MR. ROSENBAUM: Steven Rosenbaum representing
20 intervenor American Petroleum.

21 MS. DOUGLAS: Jennifer Douglas here for the
22 State of Alaska.

23 THE COURT: All right. Were you all able to
24 come to an agreement on your time? I figured you would
25 be able to. Very good.

1 I have reviewed the briefing that was filed.
2 Very helpful. I'm going to hear from plaintiff first,
3 so who am I going to hear from? Mr. Grafe?

4 MR. GRAFE: May it please the Court, my name is
5 Erik Grafe for the plaintiffs. I plan to split my time
6 this morning with my colleague Jackie Iwata. We would
7 like to reserve five minutes for rebuttal.

8 This case challenges President Trump's decision
9 to undo two withdrawals by his predecessor protecting
10 parts of the Arctic and Atlantic Oceans from oil and gas
11 leasing.

12 President Trump lacks the authority to undo
13 these withdrawals. The President's power must stem from
14 an act of Congress or from the Constitution, and here
15 neither grants him the power to reverse withdrawals.

16 I will address how Section 12(a) of the Outer
17 Continental Shelf Lands Act is a limited delegation of
18 Congress's power under the property clause to the
19 President.

20 THE COURT: What does the phrase "from time to
21 time" mean to you, Mr. Grafe?

22 MR. GRAFE: "From time to time" is a phrase
23 that is seized upon by the defendants trying to locate
24 in the text of Section 12(a) some power of reversal.
25 And they say that "from time to time" actually means --

1 grants a power to reverse withdrawals, that because
2 Congress said you can -- told the President that he can
3 withdraw from time to time, actually, it was telling him
4 that he could reverse withdrawals.

5 The argument fails for three reasons. First,
6 the very best indicator of what Congress meant by using
7 "from time to time" in Section 12 is how it used the
8 terms in other parts of OCSLA. The answer is that
9 Congress used that phrase in its most natural sense in
10 those other parts to mean when something can be done, or
11 another way to say it is to remove ambiguity about
12 whether a power is continuing.

13 For example, in Section 1351(h)(3), which
14 governs approval of development and production plans,
15 Congress directed the secretary from time to time to
16 review each plan he approves.

17 In the same provision, Congress also directed
18 the secretary to, quote, "require revisions of already
19 approved plans if needed," so "from time to time" did
20 not authorize revisions. It's the express authorization
21 to revise plans that authorizes revisions.

22 "From time to time" just means when an action
23 should happen, and so too in Section 12.

24 Now, the second argument that the defendants
25 put forward on "from time to time" is that they argue

1 that courts have interpreted the phrase in other
2 contexts to confer reversal authority, but not a single
3 one of the cases that they cite actually concludes that
4 the phrase "from time to time" in a statute confers
5 reversal authority.

6 The third reason -- argument that API offers to
7 try to locate a reversal power in "from time to time" is
8 to offer three examples that it says supports the idea
9 that words -- that the words may authorize reversals.

10 And as an initial matter, no court has found
11 that any of these examples or any examples at all confer
12 reversal authority through "from time to time." In any
13 case, each of those examples doesn't help API.

14 So their main example is a Constitutional
15 provision that authorizes Congress from time to time to
16 ordain and establish lower courts. And API argues that
17 "from time to time" here authorizes Congress to
18 eliminate previously established lower courts or to
19 reorganize the courts, but this ignores the words in the
20 statute.

21 The statute -- I mean in the Constitutional
22 provision. The Constitutional provision says you could
23 -- that Congress can both ordain and establish courts.
24 And so ordain and establish have different meanings.

25 Ordain means to issue an order, so it is a much

1 more likely place to locate an authority to revise
2 courts that have been established from time to time. So
3 it doesn't really help them to say "from time to time"
4 is the source of a modification power there. It's more
5 likely it's from "ordain."

6 Its other two examples are statutes that grant
7 Congress -- in which Congress has delegated to the
8 courts or agencies the power to make rules from time to
9 time. But in these examples, it's the delegation of
10 rule-making authority that's the most likely source of
11 any modification power, because in making rules that
12 modify earlier rules, the Court or an agency is just
13 exercising the delegated power to make rules. And
14 again, so "from time to time" doesn't -- isn't the
15 source of that power.

16 Now, as I was saying, I hope to be able to
17 address why 12(a) is a limited delegation of authority
18 that allows for withdrawals but not for reversals. And
19 my colleague -- I would also be happy to answer any
20 questions the Court has about standing. My colleague,
21 Ms. Iwata, will address why OCSLA and Section 12(a) are
22 the only sources of presidential authority to dispose of
23 or withdraw the resources of the Outer Continental
24 Shelf, and she would also answer questions about relief.

25 So going to the statute, it says in full --

1 well, first of all, as a starting point, the
2 Constitution's property clause vests the power to
3 dispose of property belonging to the United States
4 exclusively in Congress. Congress may delegate portions
5 of that power, the executive in a statute, and it's done
6 so in 12(a).

7 But in this context, the Ninth Circuit has made
8 clear that strict adherence to the wording of the
9 statute is of particular importance. That's in the
10 cases of U.S. v. Patton and Kidd v. Interior.

11 What are the words of Section 12(a)? It
12 provides in full, "The President of the United States
13 may, from time to time, withdraw from disposition any of
14 the unleased lands of the Outer Continental Shelf."

15 On its face, it gives the President one power,
16 the power to protect offshore resources for the
17 disposition. It doesn't give him the reverse power,
18 that's the power to unilaterally undo protections once
19 established. Congress has withheld that for itself.

20 The other factors that courts consider when
21 trying to understand the text of a statute all support
22 this reading of the statute.

23 First, when it passed the statute, Congress was
24 acting against a history of public land legislation that
25 demonstrates that Congress is explicit about the

1 property clause powers it delegates.

2 What it means to delegate the power to reverse
3 land protections it says so in the statute. So you have
4 statutes like the Pickett Act of 1910 that provides that
5 the President both, quote, "may withdraw any public
6 lands," and that, quote, "no withdrawals can be revoked
7 by him."

8 You also have other statutes like the
9 Antiquities Act that only authorize protections by
10 establishing national monuments.

11 Congress also passed section 12(a) against a
12 long line of executive authority in the form of attorney
13 general opinions going all the way back to 1862 that
14 conclude that where Congress delegates power to withdraw
15 land, but doesn't in the statute say the reverse power
16 is there, that the President cannot undo the withdrawals
17 unilaterally.

18 A way to think about these opinions is that in
19 effect they are the executive telling Congress at the
20 time it passed OCSLA that if it wanted the President to
21 have the power to undo withdrawals, it needed to say so
22 in the statute, and it didn't in 12(a).

23 The legislative history confirms that Congress
24 was aware of and operating against this history in
25 context. The Senate report accompanying OCSLA states

1 that Congress intended to give the President withdrawal
2 power in the offshore, quote, "comparable to that vested
3 in him with respect to federally owned lands and the
4 uplands."

5 As I just described on the uplands, there were
6 statutes that sometimes vest authority to do both and
7 sometimes vest authority only to do one. In choosing in
8 12(a) just to give one type of authority, Congress held
9 for itself the power to undo that.

10 Another indicator is in Section 3 of 1953
11 OCSLA, in which Congress is explicit and says, "The
12 power of disposition is as provided by the terms of this
13 Act," so that again is an indicator to look to the words
14 of the statute in determining what powers Congress was
15 giving up and delegating to the President through that
16 legislation.

17 And Section 12(a)'s delegation of only
18 protective authority is consistent with OCSLA's purpose
19 and structure. Contrary to the defendant's
20 characterization that OCSLA is a pure drilling statute,
21 when Congress passed OCSLA in 1953, there was no
22 management scheme at all for the offshore. This was the
23 management scheme. So it had -- it was passing
24 legislation for a vast area, and it's pretty general
25 legislation.

1 It included the power to lease, to dispose, and
2 it included 12(a), which was critical, that said, "No,
3 President, you can withhold that, withdraw areas from
4 disposition until Congress gets to reconsider an act
5 again."

6 And I would address -- we have already
7 addressed the "from time to time" argument that the
8 defendants put forward to try to locate a reversal
9 authority.

10 I would also like to address another of their
11 main arguments, which is that they argue that
12 presidential action since the passage of 12(a) cement or
13 confirm that Congress intended in 12(a) to authorize
14 reversals of withdrawals.

15 Their argument -- this argument relies
16 principally on Midwest Oil. And Midwest Oil though sets
17 a really high bar for consideration of past practice in
18 this manner. It requires a long continued action of the
19 executive that's known to and acquiesced by Congress.
20 In Midwest Oil that action was executive withdrawals of
21 land over 80 years numbering some 252.

22 And here there is just no such longstanding
23 practice that comes even remotely close. Defendants
24 cite three actions by the President, and even if these
25 actions were like President Trump's action here, which

1 I'll explain they were not, three is not 252 over the
2 course of 80 years.

3 And I'll explain why I think those actions
4 aren't very probative of Congressional acquiescence.

5 First, defendants cite two actions by President
6 George W. Bush in 2007 and 2008, in which he purported
7 to revoke portions of prior withdrawals put in place by
8 President Clinton.

9 But when he did this, Congress itself was
10 encouraging oil leasing in the areas at issue. It was
11 in the process of undoing longstanding funding moratoria
12 which prevented funding of work on lease sales. When
13 the President was -- it was totally in line with what
14 the President was going to do. Congress was encouraging
15 development of these areas and the President revoked
16 withdrawals to allow that.

17 So there wouldn't really have been any reason
18 for Congress to challenge the President's revocation.
19 It was happy. It wanted to do that.

20 Similarly, defendants also cite to President
21 Obama's 2014 withdrawal of Bristol Bay. That withdrawal
22 extended protections from an already existing withdrawal
23 in the area. And in so doing, President Obama revoked
24 that prior more limited withdrawal, but replaced it with
25 a broader withdrawal.

1 Again, here, Congress's failure to object to a
2 revocation doesn't suggest that it condones revocation
3 because the effect of the revocation was to actually put
4 in place bigger protections.

5 The Supreme Court -- I direct you to a case in
6 2016 in which the Supreme Court rejected a similar
7 argument about sort of post-enactment practice informing
8 a statute. It said that just because Congress, quote,
9 "chooses not to make a point about compliance in a
10 statute when there is no other reason to do so, doesn't
11 mean it endorses the practice."

12 That case is NLRB versus Southwest at 137
13 Supreme Court 941.

14 So the key to a Court's analysis of what
15 Section 12(a) means is Congressional intent in 1953 when
16 it passed the provision. The Court should look to the
17 traditional tools of statutory interpretation, the text,
18 the history, the context, the purpose and structure.

19 And as I have just described, these all support
20 the conclusion that Congress wrote Section 12(a) to
21 reserve for itself the power to undo withdrawals.

22 If there are no further questions --

23 THE COURT: Not at this time. Thank you.

24 MS. IWATA: May it please the Court, my name is
25 Jacqueline Iwata on behalf of the plaintiffs.

1 As my colleague Mr. Grafe stated, Congress did
2 not intend to delegate authority to the President to
3 revoke a preexisting withdrawal under Section 12(a).
4 Today I will explain why the President also does not
5 have any Constitutional authority to justify his action.

6 Defendants attempt to make this case into
7 something it is not by gesturing at foreign affairs and
8 take-care clause concerns, but the only Constitutional
9 provision at issue in this case is the property clause,
10 which is exclusive to Congress.

11 The mere presence of a foreign policy and
12 national security implications cannot give the President
13 the authority over a disposition of resources that he
14 lacks. It is true that there are foreign policy
15 concerns with the claiming of the Outer Continental
16 Shelf as well as its defense; however, those interests
17 are not at issue in this case.

18 This case is simply about the disposition of
19 resources in the Outer Continental Shelf. And the
20 Supreme Court has stated, made clear in a line of cases
21 that that power is exclusive to Congress.

22 First, in United States versus California, the
23 Supreme Court acknowledged that there were foreign
24 policy interests in the Continental Shelf. Nonetheless,
25 this did not stop it from holding a few years later in

1 Alabama versus Texas that the property clause applied to
2 the disposition of the Continental Shelf's resources
3 without limitation.

4 And then finally, in United States versus
5 Louisiana, the Supreme Court again acknowledged that
6 there were foreign policy interests with the claiming of
7 resources offshore, but that was very distinct from the
8 disposition of those resources, which it viewed as a
9 purely domestic policy issue that fell under Congress's
10 authority.

11 Nor can defendants justify President Trump's
12 action by pointing to national security concerns with
13 the resources inside the Outer Continental Shelf.
14 President Trump's executive order points to the
15 resources can be used to further national security, but
16 the same rationale could be applied to the resources in
17 the uplands. That rationale however cannot give the
18 President authority to issue oil and gas leasing in the
19 Grand Canyon.

20 Defendant's arguments would essentially subsume
21 Congress's exclusive authority to dispose of resources
22 within Article II. This is the type of executive
23 encroachment that the Supreme Court cautioned against in
24 Youngstown. It stated that -- it cautioned against the
25 President using the presence of foreign policy

1 implications to encroach on what were largely domestic
2 policy issues, and there the national security interest
3 was even greater. It was the supply of steel in an
4 ongoing war. Nonetheless, the Supreme Court declined to
5 find an Article II power.

6 That's President Trump's executive order
7 similarly at its core about the disposition of domestic
8 resources, and, therefore, there cannot be a separate
9 foreign policy justification.

10 If the Court has no further questions about the
11 foreign policy and national security arguments that the
12 defendants make, I'll turn to their arguments about the
13 President having an inherent revocation authority.

14 THE COURT: All right. Go right ahead.

15 MR. IWATA: Defendants cannot and do not argue
16 that it would be a violation of the take-care clause for
17 Congress to delegate a limited portion of its authority
18 that only goes one way.

19 This authority is exclusive to Congress and
20 plenary, and, therefore, cannot -- it can choose how
21 much or how little to delegate. Instead defendants
22 attempt to create a presumption that the President has
23 inherent revocation authority and that Congress must
24 expressly override it, but no such principle exists.

25 In fact, Ninth Circuit precedent has clearly

1 stated that there is no principle that the power to do
2 contains the power to undo. That's in Gorbach versus
3 Reno.

4 The cases that the defendant cite do not
5 support the proposition that they state. The first line
6 of cases they cite have to do with limits Congress
7 placed on the President's removal power, but that --
8 those cases are simply about the President's own
9 inherent authority and cannot provide any principles for
10 Congress's delegation of its own authority.

11 The second line of cases they cite involve or
12 state that agencies have inherent authority to
13 reconsider their decisions, but those cases are all
14 about adjudication and that the reconsideration
15 authority that they describe is actually quite narrow.

16 It's about agencies acting in an adjudicative
17 context, much like the Court, in reconsidering decisions
18 based on factual errors. That's different from clawing
19 back a decision based on substantive policy grounds like
20 the President has done here.

21 And the cases make clear that is a different
22 power. The American Trucking case by the Supreme Court
23 that we cite states that -- cautions against agencies
24 using, trying and using reconsideration power to change
25 substantive outcomes.

1 Finally, the remaining cases that defendants
2 cite do concern agency's powers to revoke regulations,
3 but those are all based on statute and thus support the
4 plaintiffs' argument that the power to revoke is context
5 dependent.

6 In fact, one way delegations are not anomalous,
7 in the land context, they are often inherently so.
8 OCSLA itself shows that OCSLA's leases create a one-way
9 movement toward development and creates a permanent
10 change to the environment that cannot be undone.

11 A one-way withdrawal authority simply acts as a
12 counterbalance in this context because to what would
13 otherwise be a one-way move toward development, and that
14 is why, as my colleague Mr. Grafe explained, it is
15 common for there to be one-way delegations of withdrawal
16 authority in the property clause context and also why
17 Congress is always clear when it delegates authority.

18 The presumption that defendants create would
19 render Congress's clear instructions surplusage. It
20 would also flip the presumption that the President's
21 authority must be delegated either by the Constitution
22 or a statute on its head.

23 THE COURT: So if you want to reserve time, I
24 think you have used about 25 minutes. So want to take a
25 moment and sum up your thoughts, and then we'll hear

1 from the other parties.

2 Take a moment.

3 MR. IWATA: In conclusion, as my colleague, Mr.
4 Grafe, said, the only issue in this case is what
5 Congress intended to delegate in Section 12(a).

6 If there are no further questions, we ask the
7 Court to declare the President's revocation of the
8 Section 12(a) withdrawals unlawful and to enjoin the
9 agency defendants from implementing it.

10 THE COURT: Thank you.

11 Good morning.

12 MR. WOOD: May it please the Court, Jeffrey
13 Wood on behalf of the United States, the federal
14 defendants in this case. I'm joined by Mr. Pomeroy of
15 the U.S. attorney's office from this district.

16 Defendants have allotted 30 minutes, Your
17 Honor. I will plan to take 20 minutes total. Since
18 this is cross motions on summary judgment --

19 THE COURT: You want the last word? That's
20 fine.

21 MR. WOOD: State of Alaska represented by
22 Ms. Douglas will take three minutes. She'll speak after
23 me. The intervenor defendants, represented by
24 Mr. Rosenbaum, will take the remaining seven minutes of
25 our time.

1 THE COURT: I'll leave you all to police
2 yourselves. Go right ahead.

3 MR. WOOD: "OCSLA is a comprehensive piece of
4 legislation that promotes the expeditious and orderly
5 development of the OCS with certain environmental
6 safeguards." Direct quote from the statute.

7 In no way is the Act structured to facilitate
8 the permanent irrevocable closure of vast offshore
9 products, nor is the Act structured to open up all areas
10 for complete and total development.

11 Instead the Act provides for meaningful
12 balance, flexible stewardship of the OCS over the long
13 term. This case centers on one sentence of this lengthy
14 statute.

15 That sentence found at Section 12(a) of the Act
16 reinforces the authority of the President to sensibly
17 and flexibly manage the OCS in the national interest.
18 In their briefs, plaintiffs call Section 12(a)
19 authority, quote, "special protective power." That
20 would have been news to Congress at the time.

21 Here they also say that it's a, quote, "limited
22 delegation." We don't think they are correct, Your
23 Honor. This statute was enacted against a backdrop of
24 significant presidential involvement under both Article
25 II power as well as delegated property clause power to

1 effectively manage the lands and waters under the
2 jurisdiction and control of the United States.

3 These are areas, Your Honor, on the outer
4 boundaries of the United States where the President's
5 power under Article II of the Constitution is dramatic.

6 No court has ever ruled that the President of
7 the United States lacks the authority to modify, simply
8 modify or revoke a prior Presidential OCS withdrawal.
9 And this Court, we respectfully suggest, should not be
10 the first.

11 In 2015 and 2016, the previous President issued
12 orders under --

13 THE COURT: Isn't it also true that no court
14 has held that the President does have the authority?

15 MR. WOOD: Your Honor, that is correct, no
16 court has been asked to rule directly on that point. We
17 think it's important though, looking at the full
18 history, when courts have evaluated issues of
19 presidential authority, that they have looked to the
20 statute, and where it provides the President significant
21 discretion, the courts have viewed their role as being
22 extremely limited.

23 They have looked for opportunities to not have
24 to rule on whether this was in fact proper presidential
25 action in the first place.

1 We don't think the lack of judicial
2 determinations on that point is determinative, Your
3 Honor.

4 President Trump issued Executive Order 13795
5 after President Obama's withdrawal. President Obama's
6 withdrawal said, quote, "It was for a time period
7 without specific authorization."

8 President Trump's withdrawal specifically says,
9 quote, "It's intended to encourage energy exploration
10 and production, including on the OCS, while ensuring
11 that any such activity is safe and environmentally
12 responsible."

13 Section 5 of the order modifies the previous
14 presidential withdrawals by restoring area for possible
15 future disposition. This action is entirely consistent
16 with the text, purpose and history of the Act.

17 Plaintiffs have challenged Section 5 of that
18 order as ultra vires because it involves one President
19 modifying a prior President's withdrawal. Such a
20 strained view of the Act and such a strained view of the
21 President's constitutional power under Article II is not
22 supported by law.

23 While our view of Section 12(a) is wholly
24 consistent with past practice, plaintiffs are pressing a
25 novel and flawed theory that would dramatically change

1 course over the current view of the President's ability
2 to act in these areas. Courts have thus far widely
3 steered clear of having to rule on such questions. At
4 the outset, Your Honor, federal defendants reiterate
5 that this lawsuit can and should be disposed of on
6 jurisdictional grounds, namely standing and ripeness,
7 sovereign immunity and lack of cause of action.

8 We also acknowledge respectfully that this
9 Court has denied our motion to dismiss, which asserted
10 these jurisdictional grounds, but at this next stage of
11 litigation, this Court is free to, and we respectfully
12 submit should, reevaluate those jurisdictional arguments
13 again, but this time under the summary judgment
14 standard.

15 THE COURT: If I were to look at it under the
16 summary judgment standard, what is the -- what's the --
17 are you now making a factual-based argument on standing
18 as opposed to simply on the complaint?

19 MR. WOOD: Yes, Your Honor.

20 THE COURT: So what are you pointing to in the
21 record that would support the standing at this time or
22 the lack of standing?

23 MR. WOOD: Thank you, Your Honor. We would
24 first note that where the plaintiffs at the motion to
25 dismiss stage simply had to put forth plausible grounds

1 for their theory, at this stage mere plausibility is not
2 adequate. We would spotlight for you, Your Honor,
3 standing in particular, which is a mixed question of law
4 and fact. So at this stage the facts are no longer
5 viewed in the light most favorable to the plaintiffs.

6 One example, the acts that might arguably one
7 day cause plaintiff some kind of injury, those things
8 that they cite in their exhibits, energy, exploration
9 and production in the areas of the OCS that are made
10 available for disposition by the 2017 order, those
11 activities are by no means imminent or even fairly
12 traceable to the executive order.

13 One example, Your Honor, there are about
14 2.8 million acres of leased lands in the Beaufort Sea
15 area that remained even under President Obama's
16 proclamation able to be used for energy production.

17 Seismic activities are occurring in those
18 areas, as well as energy exploration and development in
19 those 2.8 million acres, in the same area that they are
20 complaining that President Trump's order makes
21 available. Those areas were already available. There
22 is no imminent, immediate, concrete particularized
23 injury to plaintiffs' interests arising simply from an
24 executive order that restores the possibility, just the
25 mere possibility of development of these areas.

1 Your Honor, moving to the merits. Federal
2 defendants are entitled to summary judgment because the
3 President's 2017 order is consistent with OCSLA.
4 Plaintiffs are simply wrong to argue that the President
5 lacks authority to modify or rescind a prior President's
6 withdrawal. Section 12(a), which was quoted by
7 plaintiffs' counsel, is a concise sentence, one sentence
8 tucked within a very long, comprehensive statute.

9 That sentence does not restrict a President's
10 authority to modify for at least three textual reasons.
11 First, the text uses the highly discretionary phrases,
12 "may withdraw" and "from time to time."

13 It's hard to imagine Congress using more
14 flexible and impermanent language than that. This
15 language reinforces the overall structure and purpose of
16 the Act, which is to allow for flexible and sensible
17 management of the OCS for the long term.

18 Second, the phrases "may withdraw" and "from
19 time to time" come with no guardrails, conditions,
20 factors or other limits. They're discretionary terms
21 and have no baggage to them whatsoever. Nor do they say
22 withdrawals must be permanent, a condition that
23 plaintiffs would insert into the statute.

24 In fact, as our briefs explain, when Congress
25 inserted this withdrawal provision, the actual purpose

1 was to expand presidential authority and discretion over
2 the OCS not to hamstring the President.

3 Plaintiffs contend that this sole isolated
4 sentence allows a President to permanently close off
5 hundreds of millions of acres of offshore areas
6 depriving him and all subsequent Presidents of the
7 ability to place those areas back into productive use.

8 THE COURT: It wouldn't be permanent if
9 Congress chose to put the land back in, correct?

10 MR. WOOD: That is correct.

11 THE COURT: Permanent as to the President, but
12 not as to Congress.

13 MR. WOOD: The Congress remains free to
14 legislate in this area, but the irony of the plaintiffs'
15 argument is they wouldn't even allow the President to
16 replace one acre of withdrawn area, so they would say
17 that this limited delegation to the President gives the
18 President the authority to permanently and irrevocably
19 tie the hands of all subsequent Presidents, regardless
20 of the reason for reinserting those areas for possible
21 use, future military need, energy, security, any other
22 of a full range of needs the President might have now or
23 100 years from now to use those resources.

24 Your Honor, the word "withdraw" does not
25 customarily include concepts of permanence and

1 irrevocability, unless the words like that are used in
2 conjunction with it. To give you some examples, one
3 might withdraw from a conversation or a meeting, but no
4 one would think that means that person might never
5 rejoin the conversation or a meeting. One might
6 withdraw money from a bank, but that does not mean that
7 person might not put that same money back into the same
8 bank.

9 In fact, in 1953, it would be very common to
10 withdraw money and to redeposit the same cash soon
11 thereafter. Oxford English around the same time defines
12 withdraw to mean: To take back or away something that
13 has been given, granted, allowed, possessed, enjoyed or
14 experienced.

15 There is no requirement at all that it be a
16 permanent withdrawal. In fact, one would not assume
17 something is withdrawn permanently unless the withdrawal
18 is phrased that way. That's also how it's understood in
19 the relevant legal backdrop. Throughout our history,
20 both before and after the Act, Presidents did in fact
21 withdraw land for some purpose only to subsequently
22 return the land for use for other purposes.

23 This is a common and usual understanding for
24 the phrase "withdraw." It would be even more true when
25 it says "may withdraw from time to time," and then super

1 true, Your Honor, when it's with regard to the President
2 and his power to make decisions as the nation's chief
3 executive.

4 Your Honor, I also want to make the point that
5 to succeed on plaintiffs' audacious claim, this Court
6 would have to ignore the fact that as the Supreme Court
7 has recognized Congress does not hide elephants in mouse
8 holes.

9 At the time this law was passed in 1953, the
10 Senate Interior Committee, which was the lead committee
11 that wrote and rewrote the statute, specifically talked
12 about why they put this in there. And they said, Your
13 Honor, the committee believed that the authority of the
14 President to withdraw certain areas of seabed from
15 leasing should not be limited to security
16 requirements. The authority vested in the President by
17 12(a) is comparable to that which is vested in him with
18 respect to federally owned lands and the uplands, and that
19 included that historic ability to put lands in and take
20 lands out.

21 It would be an incredibly vast power that
22 Congress certainly would not have contemplated at the
23 time to allow the President to permanently and
24 irrevocably revoke the legislation.

25 Your Honor, it's interesting to me in 1953 at

1 the immediate time when this bill was enacted, Warren
2 Christopher, who became Secretary of State, actually
3 wrote a leading law review article on the legislation.
4 1953, it's in Stanford Law Review. He said that -- had
5 full discussion of the Act, what it mean, why it was
6 written.

7 In the very back of this article he had a
8 section on miscellaneous provisions. He had one or two
9 sentences on Section 12, and in no way describes it as
10 being as vast and robust authority as the plaintiffs
11 suggest.

12 Your Honor, beyond these textual reasons --

13 THE COURT: How does he describe it?

14 MR. WOOD: Your Honor, he says -- he puts it in
15 the section on miscellaneous provisions and said it
16 simply gives the President the authority to withdraw
17 areas.

18 And also, he said in that 1953 article,
19 "Special attention is due the actions of the Senate
20 Interior Committee, which in May and June of '53, wrote
21 or rewrote most of the provisions of the bill that was
22 eventually enacted."

23 We think, Your Honor, if Congress thought at
24 the time it was giving the President the ability to pull
25 out every bit of OCS areas, which is what plaintiffs

1 argue, the law would not have passed and Congress would
2 not have allowed that kind of irrevocable permanent
3 action to undermine the purpose of the Act, which is to
4 allow the expeditious development of these energy
5 resources.

6 As to history, 1992, President Bush noted that
7 the withdrawal of the areas at OCS were, quote, "subject
8 to revocation should the President determine the
9 scheduling of a lease sale to be required in the
10 interest of national security."

11 Again, in 1998, President Clinton noted that
12 his withdraws of areas of the OCS were, quote, "subject
13 to revocation by the President in the interest of
14 national security." It's worth noting here, Your Honor,
15 that President Trump cited national security concerns,
16 along with other factors, when issuing the executive
17 order at issue in this case.

18 And dating back to pre-OCSLA in 1945, the
19 President, President Truman at the time, first exercised
20 U.S. control over these areas under his Article II
21 authority over national security and foreign affairs.

22 Your Honor, my time is running out, so at this
23 point, I would like to turn it over to the State of
24 Alaska.

25 THE COURT: Thank you.

1 MR. DOUGLAS: Good morning. May it please the
2 Court, Jennifer Douglas here on behalf of the State of
3 Alaska. I'll try to keep my remarks as concise as our
4 briefing, Your Honor, and just briefly highlight our
5 position in this case, which is that Section 5 of
6 Executive Order 13795 is a lawful exercise of
7 presidential authority under Outer Continental Shelf
8 Lands Act of Section 12(a).

9 The expression "from time to time" is a phrase
10 that Congress uses intentionally to allow for subsequent
11 changes. OCSLA in no ways limits the President's
12 authority with respect to lands unaffected by a prior
13 withdrawal. The only limitation appearing in 12(a) is
14 with respect to unleased acreage.

15 We think that the statute is actually pretty
16 clear here and that upland statutes are of limited
17 relevance, and certainly not outcome determinative in
18 their text. But unless there is questions, the State is
19 content to rest on its briefing and allow API to have
20 the remaining time.

21 THE COURT: Thank you.

22 MR. ROSENBAUM: Good morning, Your Honor. I
23 would like to focus first on how the term "from time to
24 time" has been used in other statutes and how it's been
25 applied, including the Constitution. It appears only

1 once in the Constitution.

2 What it says is that Congress may from time to
3 time ordain and establish lower courts. It's true they
4 used the term "ordain and establish," but I have no idea
5 why the plaintiffs think that that language provides
6 greater flexibility than "withdraw." They are just both
7 the operative verbs.

8 The question is whether courts, once ordained
9 and established, can be taken away. And the history,
10 and this of course goes back to 1789, has been that
11 Congress has ordained courts. It has then abolished
12 those courts. It has established temporary courts that
13 had specific expiration dates. It has had temporary
14 courts that would disappear when certain subsequent
15 events occurred.

16 Congress has established courts of limited
17 jurisdictions, of exclusive jurisdiction. Congress has
18 determined that courts could not deal with certain
19 things. These are all flexibilities both to establish,
20 to take away, that have been followed for over 200 years
21 in the context of the exact same language that appears,
22 the exact same language that appears in the Outer
23 Continental Shelf Lands Act.

24 Another example which also deals with courts is
25 28 U.S. Code 2071(a). The Supreme Court and lower

1 courts may from time to time prescribe rules for the
2 conduct of their business.

3 No one would presuppose that courts couldn't
4 change those rules over time as they saw fit. Of course
5 they have done that forever since that statute was
6 enacted. This is discretion squared. "May" means the
7 President can do it, but doesn't have to do it. And
8 "from time to time" has to mean, it has to mean in this
9 context that as needs change or attitudes change or the
10 Presidents change, so too can the withdrawal, and so too
11 can the decision as to what the withdrawal will cover.

12 Other statutes have been read similarly.
13 Illinois Central, an old case, we describe a statute
14 that deals with the fact that the President was given
15 the power. He could, he may, didn't have to, establish
16 certain forts from time to time, and the courts
17 concluded that as the need for the fort disappeared over
18 time, then Congress -- then the President had the right
19 to abandon those forts.

20 THE COURT: What's your thought with regard to
21 the AG opinions that were cited in the briefing that
22 predated the statute, that talked about -- I can find
23 where they are in the briefing, but opinions from the
24 United States attorney general that said the President
25 is without authority to abolish reservations when he was

1 only given the authority to create them?

2 MR. ROSENBAUM: Your Honor, to the extent that
3 a particular action carried with it some subsequent
4 specific use of the land, something that was going to be
5 done with it, that might in the context of another
6 statute carry with it a notion of permanence because
7 there was reliance, because there was other uses
8 actually being made of it. That's a possibility. But
9 not here, of course, where withdrawal doesn't dedicate
10 the land to anything.

11 And that takes some history. Now, I can't give
12 you 120 years of history as the plaintiffs suggest is
13 necessary. I only have a statute that goes back to
14 1953, so I can only give so much history. But I can
15 tell you that there is at least 30 years of history
16 going back to 1990, 28-year history going back to 1990
17 of the Presidents consistently interpreting the
18 withdrawal power flexibly.

19 The very first by President Bush, June 26,
20 1990, the first President Bush, declaring certain areas
21 withdrawn until after the year 2000. Well, where did he
22 get the authority to only withdraw until after the year
23 2000? It's not stated in the statute. From plaintiffs'
24 point of view, that was ultra vires. Withdraw is a
25 one-way street. When you declare withdraw, you're done.

1 That's not how it was interpreted.

2 Similarly, President Bush did it again
3 August 4, 1992. There he did a withdraw until a
4 particular study that was underway was completed. I
5 mean talk about flexibility, talk about an understanding
6 that withdrawal meant something that was then permanent.

7 President Clinton -- this is a bipartisan
8 thing. President Clinton, June 12, 1998, he declared
9 certain areas offshore through June 30, 2012.

10 Once again, flexibility. These are all --
11 under a statute, a provision that doesn't actually talk
12 about temporary withdrawals, but everyone, all these
13 Presidents understood that they could engage in
14 temporary withdrawals, the flexibility the plaintiffs
15 won't read into the statute.

16 Then of course we have President George W.
17 Bush January 9, 2007 and July 14, 2018, modifying
18 President Clinton's withdrawals to make certain areas
19 available that were not previously available, the very
20 kind of conduct, of course, that we're now dealing with
21 here in this litigation.

22 Now, he acted -- the plaintiffs' point of view
23 is you can't do that unless you get a specific statute
24 passed by Congress to reinstate that withdrawn area.
25 That didn't happen. That did not happen. There was no

1 such statute.

2 And yet it was done and nobody protested and
3 lease areas were included in the five-year leasing
4 program that otherwise couldn't have been.

5 So the Supreme Court in the Noel Canning case
6 in 2014 reaffirmed that long continued practice is very
7 important in interpreting statutory provisions. They
8 cited back to the Midwest Oil case. The plaintiffs
9 claim Midwest Oil isn't good law anymore. There have
10 been statutory changes, true, but the principle of
11 Midwest Oil that you look to long history to determine
12 how powers are properly interpreted and applied, that is
13 still good law because it was cited in Noel Canning for
14 that very proposition.

15 We have a consistent attitude -- conduct here
16 that we think clearly has to be read and applied to
17 allow the conduct here.

18 And that is backed up by the Youngstown Steel
19 principle. Plaintiffs rely on Youngstown Steel, but we
20 think it reads just the opposite. We rely principally
21 on Justice Jackson's famous concurrence where he said
22 that "A President's sole powers are entitled to the
23 widest latitude of judicial interpretation." I'll
24 repeat that, "the widest latitude of judicial
25 interpretation," when there is both delegated power, and

1 here of course there is delegated power.

2 I mean, the whole OCSLA is entirely a delegated
3 power to the executive. Almost all the power is
4 actually in the executive to decide where to lease, when
5 to lease, what leases to engage in. Congress handed all
6 that over to the executive.

7 And second, of course, the President has his
8 own Article II powers to provide for national security
9 and conduct foreign affairs. And OCSLA is based in part
10 on that. So when those two combine, according to
11 Justice Jackson, that's when the Court is to be most
12 deferential to the determination of what the President's
13 powers are, and that applies four square here.

14 And then finally, Your Honor, it's in the
15 context of a statute that is in its very words aimed
16 toward the, quote, "expedited exploration and
17 development of the oil and gas resources of the OCS."
18 They say that twice. It's in 43 U.S. code 18021 and
19 they say it in 43.133(2)(3). That's both in 1953 and
20 after it was amended in 1978.

21 After the 1978 amendments, the DC Circuit said
22 succinctly, quote, "The Act has an objective: The
23 expeditious development of OCS, the resources," end
24 quote, and other things were secondary.

25 Under those conditions, we think it's

1 impossible to read this statute to allow a President to
2 tie the hands of all future Presidents and declare vast
3 sweeps of the OCS offshore to oil and gas leasing.

4 Now, the President may have the power to do
5 that himself for his own term by issuing such as
6 withdrawal, but it is -- it is simply inconsistent with
7 the structure and purpose of the OCS Lands Act to read a
8 provision that talks about what a President may do and
9 what a President may from time to time do to allow that
10 kind of limitation on executive authority simply because
11 one President chooses to have that particular point of
12 view.

13 This is not obviously a hypothetical concern
14 here. I mean, the Chukchi Sea was placed completely off
15 limits. The latest numbers from the federal government
16 are there is 9.25 billion barrels of economically
17 produceable, not just technically produceable, but both
18 technically and economically produceable oil in the
19 Chukchi. There is 6 billion in the Beaufort.

20 If one is going to allow -- that's using the
21 mid case economics. I should be clear about that.

22 That it's just impossible to see how a
23 provision that historically with "may from time to time"
24 verbiage, which in so many contexts has been interpreted
25 to allow action and then reversal action and revision

1 and modification, in so many contexts, as I started my
2 presentation with, that somehow that should be read in a
3 different way, the opposite way in the context of a
4 statute that is entirely pro exploration and
5 development. Of course leasing is the necessary
6 predicate of that.

7 Under the structure of the OCS Lands Act, you
8 can't explore and develop unless you have a lease to
9 begin with.

10 THE COURT: Thank you.

11 Mr. Grafe, are you going to do rebuttal?

12 MR. GRAFE: Thank you, Your Honor. I just want
13 to address a few things.

14 First, words matter and the context matters, so
15 the statute, as I have explained, used -- it delegated
16 only one type of authority, and the history and the
17 context at the time that Congress passed that statute,
18 as we have shown, demonstrates that that matters.

19 And with respect to a difference between
20 withdraw and reservation, at the time it passed that
21 statute there was no difference in those terms at that
22 time. They meant the same thing.

23 And as we highlighted in our brief, there is a
24 -- Congress passed a statute in 1957 limiting certain
25 defense withdraws, and in the legislative history of

1 that statute it explicitly said, "We use withdraw and
2 reservation interchangeably."

3 And the defendants would just brush over that
4 and say, well, there was a lot going on on the onshore,
5 that's what was delegated on the offshore, but, no, we
6 have demonstrated that Congress is precise about its
7 delegations.

8 THE COURT: So in your reading of the statute,
9 could a President say, "I'm going to withdraw all of the
10 unleased lands in the Outer Continental Shelf
11 permanently from development"?

12 MR. GRAFE: Again, that's not --

13 THE COURT: It's a hypothetical.

14 MR. GRAFE: I think the answer is yes, it's --
15 the President -- the reason for it is that what the
16 statute allows the President to do is to identify areas
17 that he thinks should be held back and then gives
18 Congress, or held back until Congress acts, so throws it
19 back to Congress.

20 And makes sense because this was a statute that
21 in 1953 for the first time was managing, providing a
22 management regime for the Outer Continental Shelf. And
23 so there might be an outer bound that is too far, but
24 it's perfectly consistent and reasonable that Congress
25 would in promulgating a statute that's general and

1 covers a big area that's a new area, give this President
2 the power to -- the President is going to be managing
3 it, say, "I have identified an area that I think should
4 not be leased without further consideration by
5 Congress," and that's the function of 12(a).

6 THE COURT: And you read the statute to -- do
7 you read the statute to allow the President to, say,
8 withdraw for a period of time, like President Bush did?

9 MR. GRAFE: So the question of whether there
10 could be temporary withdrawals or time-limited
11 withdrawals is a question of Congressional intent. And
12 it's not an issue that's been briefed here.

13 And the answer to that question isn't
14 determinative of the outcome here, and that's because
15 whatever types of withdrawals Congress may have
16 authorized the President to put in place, President
17 Trump here revoked the withdrawal.

18 It's very clear that the text history and
19 context of 12(a) didn't give that reversal, opposite
20 power to the President.

21 THE COURT: Do you have a position on how to
22 interpret the statute with regard to the question that
23 was posed with: Does the statute accord a President the
24 right to have a limited time withdrawal, or you have no
25 position on that?

1 MR. GRAFE: Our position is that we don't have
2 a position on that. We have -- but I would just say --
3 it's a matter -- like the revocation, it's a matter of
4 Congressional intent, and so things that might be
5 probative to that are what Congress has done in other
6 public land statutes.

7 I would just point out that in other public
8 land statutes like the Pickett Act, Congress is explicit
9 when it gives temporary power, so the Pickett Act
10 authorizes temporary withdrawals. Here Congress didn't
11 say one way or another permanent or temporary.

12 Again, it would just be a question of
13 Congressional intent. I would say with respect to
14 standing, quickly, I wanted to point out that the
15 defendants do not in fact dispute our factual evidence.
16 They say that at Docket 56 at 18 that they do not assert
17 any -- they don't assert any genuine issues of material
18 fact.

19 And plaintiffs have -- this Court found
20 standing based on the pleadings. Plaintiffs have
21 provided evidence to support the pleadings. And there
22 is no reason for the Court to reconsider that standing.

23 And as to API's invocation of Youngstown, in
24 fact, here we are -- if you think about the Youngstown
25 framework, we're in the framework where the President's

1 power is at its lowest because there is no delegated
2 authority we assert in 12(a), and the President doesn't
3 have independent authority, Constitutional authority
4 with respect to disposition of lands in the Outer
5 Continental Shelf, as my colleague Jackie Iwata has
6 said. The power that he has must come from Congress,
7 and it was not delegated here.

8 THE COURT: Thank you.

9 MR. WOOD: Your Honor, Jeffrey Wood on behalf
10 of the United States. You raised a very important
11 question: Can a President do a time-limited withdrawal?
12 You heard the plaintiffs say they could not answer that
13 question because if they answered it, they would have to
14 say that every past President who exercised 12(a)
15 authority did it in the wrong way, as our briefs show.
16 President Bush, President Clinton, President George W.
17 Bush, even President Obama in his withdrawals used the
18 phrase "time period" without specific expiration.

19 Your Honor, I do think it's helpful to look at
20 some hypotheticals. Consider this: Again, OCSLA being
21 a flexible statute intended to promote the development
22 of OCS. Suppose a president withdrew areas from
23 disposition because he wanted to allow temporary science
24 research project to occur or for a temporary economic
25 development project that was not compatible to leasing

1 in the area.

2 Would that President or any subsequent
3 President be barred from modifying or rescinding or
4 changing that withdrawal when that temporary study or
5 project was ended? Of course not.

6 Suppose that the President was looking at two
7 areas of the OCS, in another hypothetical, one area
8 where the President determined that there was, based on
9 data, high conservation value, and another area where,
10 based on current data, decided that energy development
11 was particularly important in that area.

12 Suppose the data changed a few years later, or
13 decades later, and the President decided he wanted to
14 make a change. OCS as it's currently written would
15 allow a President to operate flexibly in line with
16 purposes of the Act. Plaintiffs would deprive any
17 President of that very basic authority.

18 Your Honor, you asked a question about the
19 attorney general's opinions. I did want to respond to
20 that briefly if I might.

21 THE COURT: Go right ahead.

22 MR. WOOD: So in the 1930s, I believe you're
23 referring to the Attorney General Cummings' opinion with
24 regard to the Antiquities Act. That was specifically
25 about language that's not at issue here and it predated

1 OCSLA, but even that opinion that said the President
2 could not abolish did allow for modifications, but the
3 Antiquities Act language is very different than what's
4 at issue here. Antiquities Act gives the President
5 discretion to make monumental proclamations, but then
6 says "shall confine the limits to the smallest area
7 compatible with protection of the objects."

8 So when Congress was granting this vast
9 authority under the Antiquities Act, it limited the
10 ability to do it to vast areas. The President had to
11 make a determination that's the smallest area compatible
12 with protection of the object. That's amazing that's
13 missing from Section 12(a), which simply says the
14 President may from time to time withdraw areas, but if
15 Congress intended to give basically Antiquities Act
16 power in OCS to the President for that kind of thing,
17 they would have said something different than they said
18 here, Your Honor.

19 We do agree with plaintiffs that Youngstown
20 Steel, the last case referenced by them, we do think
21 that's a helpful framework. We submit that of the three
22 categories, category one is the most appropriate because
23 there is express or implied authorization from Congress
24 for the President to act in this way. The President has
25 his own power and his own right under the Constitution,

1 plus all the power that Congress has given him, both in
2 the Act and under the delegated property clause power.

3 If it wasn't category one in Youngstown Steel,
4 we still think we win because category two says you
5 apply a flexible deferential test for presidential
6 actions when there is an absence of express grant or an
7 express denial of authority. We think that would be a
8 fine category for us as well.

9 We simply don't believe that this is the kind
10 of category three steel seizure kind of context that
11 plaintiffs would like to fit this into, Your Honor.

12 THE COURT: Thank you all. I'll take the
13 matter under advisement. The briefs were very helpful
14 as well from everyone, so thank you.

15 And we'll stand in recess at this time. We'll
16 go off record.

17 DEPUTY CLERK: All rise. Court is now
18 adjourned. This court stands in recess until 11:30 a.m.

19 (Proceedings concluded at 11:02 a.m.)
20
21
22
23
24
25

1 CERTIFICATE

2 I, Sonja L. Reeves, Federal Official Court Reporter
3 in and for the United States District Court of the
4 District of Alaska, do hereby certify that the foregoing
5 transcript is a true and accurate transcript from the
6 original stenographic record in the above-entitled
7 matter and that the transcript page format is in
8 conformance with the regulations of the Judicial
9 Conference of the United States.

10 Dated this 30th day of January, 2019.

11 /s/ Sonja L. Reeves
12 SONJA L. REEVES, RMR-CRR
13 FEDERAL OFFICIAL COURT REPORTER
14
15
16
17
18
19
20
21
22
23
24
25